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In the Supreme Court of the United States

OCTOBER TERM, 1993

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GREENWICH COLLIERIES

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

MAHER TERMINALS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent Greenwich Collieries explicitly agrees (Greenwich Br. in Opp. 22) that the petition for a writ of certiorari in this case should be granted, recognizing both that the courts of appeals are divided (*id.* at 9) and that the issue is an important one (*id.* at 21). Respondent

Maher Terminals, while not expressly urging certiorari, likewise agrees that "every consideration important to determining whether a writ of certiorari should issue exists" in this case. Maher Br. in Opp. 29. We therefore submit that it is appropriate to treat this as a case in which all parties agree that further review is appropriate.[1]

Both respondents nonetheless assert that the government has mischaracterized the origins and operation of the "true doubt" rule. Greenwich Br. in Opp. 15-17; Maher Br. in Opp. 7, 19-20. In particular, Maher argues (*ibid.*) that no "rule of doubt" was applied to factfinding under the Longshore and Harbor Workers' Compensation Act (LHWCA) until *Young & Co.* v. *Shea*, 397 F.2d 185, on petition for rehearing, 404 F.2d 1059, 1061 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969). Maher also argues (Br. in Opp. 5-6, 9-11, 21-25), and Greenwich Collieries suggests (Br. in Opp. 4), that as applied under the LHWCA and the Black Lung Benefits Act (BLBA), the "true doubt" rule does not merely allocate the risk of non-persuasion, but allows factfinders to avoid weighing evidence and permits awards that are not based on substantial evidence. These contentions merit a brief response.

[1] Since the filing of our petition in this case, petitions have also been filed in the cases decided by the Sixth and Seventh Circuits that conflict with the decisions rendered by the Third Circuit in this case. See *Freeman United Coal Mining Co.* v. *Jones*, No. 93-935; *Consolidation Coal Co.* v. *Skukan*, No. 93-964. The petitioner in *Freeman United* has requested that its petition be held pending a decision on the petition in this case (93-935 Petitioner's Motion to Hold Ruling on Petition for Certiorari in Abeyance), and the petitioner in *Consolidation Coal* has consented to similar treatment of the petition in that case (93-964 Pet. 11).

The "true doubt" rule provides that when evidence submitted by a claimant and the party opposing an award of benefits is of "equal weight," the remaining doubt is to be resolved in favor of the claimant. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 144 n.12 (1987); see also 93-474 Pet. App. A2 (describing rule as applied below in *Maher Terminals*). Petitioner's predecessors have applied this rule in administering the LHWCA since at least 1943. See *F.H. McGraw & Co.* v. *Lowe*, 145 F.2d 886, 887 n.1 (2d Cir. 1944). It is one application of the more general principle that "[d]oubts, *including the factual*, are to be resolved in favor of the employee or his dependent family." *Friend* v. *Britton*, 220 F.2d 820, 821 (D.C. Cir. 1955) (emphasis added). Respondent Maher Terminals is therefore incorrect in stating (Br. in Opp. 20) that no case held that a doubt rule applies to factfinding under the LHWCA until the Fifth Circuit's 1968 decision in *Young & Co.* v. *Shea*, *supra*. The "true doubt" principle was well established by the time of that decision, as the *Young & Co.* court itself recognized. See 397 F.2d at 188 (citing cases).[2]

Nor is there merit to the contention that the "true doubt" rule allows administrative law judges to avoid weighing evidence, or permits courts to affirm awards

[2] Maher also identifies three decisions stating that LHWCA claimants had the burden of proving or showing causation. Br. in Opp. 19-20, citing *Calbeck* v. *Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962); *Gooding* v. *Willard*, 209 F.2d 913 (2d Cir. 1954); and *Eschbach* v. *Contractors, Pacific Naval Air Bases*, 181 F.2d 860 (7th Cir. 1950). The courts that decided those cases were not presented with the question of which party bears the burden of persuasion when evidence is in equipoise, and did not acknowledge other decisions recognizing that doubtful questions should be resolved in favor of claimants. Accordingly, they cannot be read as rejecting use of the "true doubt" rule.

that are not supported by substantial evidence. The Benefits Review Board properly vacates awards that do not explain how the ALJ weighed relevant evidence, because "[t]he resolving doubts rule * * * should not become an easy device with which administrative law judges can abdicate their primary responsibility as hearing officers to weigh the evidence and make factual findings." *Betz* v. *Arthur Snowden Co.*, 4 Ben. Rev. Bd. Serv. (MB) 805, 808 (1981). Courts of appeals, in turn, review under a substantial evidence standard both those close cases in which the ALJ has determined that the evidence is *not* in equipoise (see *Sprague* v. *Director, OWCP*, 688 F.2d 862, 868 n.12 (1st Cir. 1982)) and those in which the ALJ has determined that it is. See *Old Ben Coal Co.* v. *Battram*, 7 F.3d 1273, 1274-1276 (7th Cir. 1993); *F.H. McGraw & Co.*, 145 F.2d at 888.[3]

For the foregoing reasons and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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[3] Some courts have stated generally that the statutory policy of resolving doubtful factual questions in favor of a claimant results in "a less stringent standard of persuasion" than "the preponderance-of-credible-evidence test." *Young & Co.*, 397 F.2d at 188; see also *Noble Drilling Co.* v. *Drake*, 795 F.2d 478, 481-482 (5th Cir. 1986). Those decisions do not allow claimants to prevail without having adduced substantial credible evidence in support of their claims; they merely recognize that LHWCA (or BLBA) litigation differs from ordinary civil litigation, and that where the "true doubt" rule applies, employers bear the ultimate risk of non-persuasion.